



Nekesa v County Assembly of Bungoma & 3 others (Employment and Labour Relations Cause E001 of 2023) [2023] KEELRC 896 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2023**

**JW KELI, J
APRIL 14, 2023**

BETWEEN

RACHEL RAEL NEKESA CLAIMANT

AND

COUNTY ASSEMBLY OF BUNGOMA 1ST RESPONDENT

BUNGOMA COUNTY ASSEMBLY BOARD 2ND RESPONDENT

SPEAKER OF THE ASSEMBLY OF BUNGOMA 3RD RESPONDENT

THE CLERK COUNTY ASSEMBLY OF BUNGOMA 4TH RESPONDENT

RULING

1. The Claimant/Applicant filed a claim in court dated 31st January 2023 seeking various prayers against the respondents to prevent her removal from member position with the 2nd respondent.

In addition the applicant filed Notice of Motion of even date received in court on the 2nd February 2023 under Articles 3,10,23,27,35,41,47 and 50 of the Constitution, Order 53 of the Civil Procedure Rules, Sections, 5,8,9,10 of the County Assembly Services Act, 2017, Sections 12 of County Governments Act No.17 of 2012 and all other enabling provisions of the law seeking the following reliefs:-

- i. That the instant application be certified as extremely urgent and merits to be heard *ex-parte* at the earliest opportune time and on priority basis at the first instance.
- ii. That pending hearing and determination of this Application and/or the claim herein, the Honourable Court be pleased to grant a stay Order, staying the 1st Respondent's on -ongoing recruitment exercise as stated in the press advertisement titled vacancy in the County Assembly Service Board of Bungoma an/or Vacancy Title, member of the County Assembly Service Board, which was published in various media platforms, including Daily News papers/ prints between 25th January, 2023 to 26th January, 2023 and or on other dates of publication within



the media, inviting applications from eligible candidates to fill the vacancy in the office of the Member of the County Assembly Service Board.

- iii. That Pending the hearing and determination of this Application and/or the claim herein, the Honourable court be pleased to issue a temporary Order of prohibition prohibiting, the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect in any way whatsoever, the press advertisement titled Vacancy Title, Member of the County Assembly Service Board, which was published in various media outlets, including Daily News Papers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates of Publication in media, inviting applications from eligible candidates to fill the vacancy in the office of the Member of the County Assembly Service Board.
 - iv. That pending the hearing and determination of this Application and/or Claim herein, the Honourable Court be pleased to quash the Respondents' press advertisement titled Vacancy in the County Assembly Service Board of Bungoma and/or vacancy title, Member of the County Assembly Service Board, which was published in the media, including Daily News papers/ prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the member of the County Assembly Service Board.
 - v. That pending the hearing and determination of this Application and /or claim herein, the Honourable court be pleased to declare the composition of the 2nd Respondent which now is composed of only members of the male gender as being unconstitutional, and hence the same cannot make any legally binding public decision and therefore the 2nd Respondent's press advertisement titled vacancy in the County Assembly service board of Bungoma and / or vacancy title, Member of the County Assembly Service Board, the advertisements for the Vacancy for the Deputy Clerk and Principal Finance Officer which were published in the media, including Daily news papers/prints between 25th January, 2023 to 26th January, 2023 and/or on other dates within the media inviting applications from eligible candidate to fill the said vacancies are null and void hence unconstitutional.
 - vi. That in the alternative to prayers 1,2 and 3 and without prejudice to the long term need to have the criteria for the appointment of the vacancy title member of the County Assembly Service Board, which was published in the various media outlets including the Daily prints on Tuesday January 25, 2023 and/or on other vacancy in the office of the Member of the County Assembly Service Board, the advert(s) announcing a vacancy in the office of the Member of the County Assembly Service Board, which the Respondents have published and published, be withdrawn in favour of the determination of the cases before this court impacting on the Applicants employment including ELRCJR NO. E 026 of 2022 which was renumbered ELRCJR NO 1 of 2022 and the current case between the parties herein.
 - vii. That subsequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour for the cause of justice.
 - viii. That costs be in the cause.
2. The Application is premised on various grounds and supporting affidavit of the applicant sworn on the 31st January 2023 together with annexures. The grounds were listed as follows:-



- (a) The Applicant herein was appointed pursuant to section 12(3) (d) of the County Governments Act No. 17 of 2021 and Sections 46 (d) of the County Assemblies Services Act 2017, *vide* a letter dated 12th October, 2018 and still holds the position of Member of County Assembly Board.
- (b) That the County Assembly Board of Bungoma now has full membership as provided for under the law and there is no vacant position for any other member.
- (c) That 2nd Respondent whom contrary to Article 27 (8) is composed/constituted has however in utter breach of Section 5 of the County Assembly Services Act, 2017, and other legal provisions illegally and/or unprocedurally advertised as vacant the position held by the Claimant, while the Claimant is still holding office, and has also advertised other positions, including that of the Deputy clerk and Principal Finance Officer.
- (d) That the Claimant has neither resigned, been dismissed and or in any manner been subjected to any process of removal from office, but she is only on suspension following a disciplinary process, which disciplinary process has been challenged in the court *vide* a judicial review case ELRC Judicial Review Case No E026 of 2022 which was filed in Nairobi and transferred to this court and re -numbered ELRCJR Case No. 1 of 2022 between the parties herein, which case is pending determination.
- (e) During the various sessions in which the parties have appeared before Court in respect to the ELRCJR CASE NO. 1 of 2023 the Respondents have expressly notified this court orally that the claimant has only been suspended from membership to the 2nd Respondent and has not been terminated from work, as communicated through the letter dated 22nd September, 2022 addressed to the Claimant by the Respondents which letter is the core issue in the judicial review case.
- (f) It therefore remains undisputed that the Claimants position has its holder, and the same position cannot be advertised as vacant, but the Respondents have made the said advertisement as a back door means to kick out the Claimant from office unprocedurally.
- (g) Further to the above, while the claimant is on suspension, the current composition and/or constitution of the 2nd Respondent is unconstitutional to wit, it offends Articles 27 (8) 175 (c) 197 (1) of the Constitution 2010, hence any purported conduct of business by the 2nd Respondent remains unconstitutional therefore null and void.
- (h) In any event orders prayed herein are not granted, and if the ELRCJR Case No .1 of 2022 between the parties herein above referred to, shall be determined in favour of the Claimant in respect to the prayers sought, then orders that may be issued to that effect shall be unenforceable, as the same shall have been overtaken by events.
- (i) That court orders are never issues for casual purposes, but they are mandatory in nature and must be obeyed.
- (j) It is therefore of lawful essence that the court considers to grant the Claimant the Orders sought herein to not only protect the Claimants rights, but also to safeguard the legal authority of courts.
- (k) In any event the orders sought herein are not granted, then the subject matter of this suit stands to be lost, and hence this suit shall only be for academic benefit.



- (l) Further to the above, the Respondents have with each effrontery become accustomed to breach of the law and embedded themselves in compound breach of others rights, whereby they take advantage of their ill conceived megalomaniarism and high bargaining power in employment contracts to un-procedurally and hurtfully destroy people's careers and life-hood.
 - (m) Unless the court therefore exercises its constitutional mandate to protect the rights of the citizens the respondents shall uncontrollably and limitlessly maintain a culture of destroying the peoples' life hoods in the nature of employment, in the open faced offending arrogance and infringement of peoples' rights.
 - (n) Article 47 (1) lays a constitutional foundation for control of the powers of state organs Public bodies and it also embraces the right to fair administrative action in the bill of rights which Article has remained rather persuasive than legally binding to the Respondents.
 - (o) The court is therefore invited to guard against a culture of impunity in employment where the Respondents errantly and as public officers deliberately ignore the procedures and use unconstitutional methods to terminate their juniors employment unlawfully, well knowing that their only remedy, after protracted legal battles such as the one various persons who have approached the court against the Respondents are going/have gone through will be monetary compensation, that is if the unlawfully dismissed employee survives through.
 - (p) Further to the above, it remains here that the Claimant stands to lose her employment through an irregular, unprocedural, illegal unconstitutional and offensive process, a complete disregard of law, public order and public policy.
 - (q) The 2nd Respondent also being a public statutory body, need to be protected from the impunity manifested by the Respondents.
 - (r) The Respondents have manifestly ignored the procedural fairness and deliberately abused the essence of the constitutionally envisaged sustentative fairness and consequently prejudicially and irreparably affecting claimant, hence the instance of this suit.
 - (s) The Respondents shall suffer no irreparable harm.
3. The Application was opposed by the respondents *videreplying* affidavit of Emmanuel Mukhebi Situma sworn on the 9th February 2023 and received in court on the 10th February 2023 together with annexures.
 4. The Applicant in reply filed further affidavit sworn on the 12th February 2023 and received in court on the 15th February 2023.
 5. The court issued directions that the application be canvassed by way of written submissions. The parties complied. The applicant's written submissions drawn by Kipngeno Associates Advocates were dated 24th February 2023 and received in court on the 28th February 2023. The Respondents' written submission drawn by the Legal Counsel of the County Assembly of Bungoma were dated 5th March 2023 and received in court on the 8th March 2023 together with supplementary affidavit of Emmanuel Mukhebi Situma dated 8th March 2023 filed with the leave of the court.

Applicant's case in summary

6. The Applicant's case is supported by her supporting affidavit dated 31st January 2023 and her further affidavit dated 12th February 2023. The applicant states that she was an employee of the 2nd respondent holding the position of a female member appointed pursuant to section 46(3) of the [County Assembly](#)



Services Act, 2017. That on the 20th September 2022 she received a letter stopping her from duty and receipt of salary that upon receipt of the said letter she filed JR 001 of 2022 between herself and the respondents which case is awaiting determination. In the said case the applicant sought to quash the said letter dated 20th September 2022, prohibition against the interference with her tenure in office and order of mandamus reinstating her to office without her terms being altered negatively, order of permanent injunction barring the 5th respondents in the suit from summoning, arresting and charging /investigating her on any issue levelled against her by the respondents.

7. During the pendency of the judicial review suit, on the 25th January 2023 the applicant learnt that her position as a member of the 2nd respondent had been advertised as vacant which caused her confusion as she had not resigned or been terminated from employment. That during viva voce hearing of the judicial review suit the respondents informed the court the applicant was on suspension. That she was the only female member on the 2nd Respondent board membership and hence her absence means the 2nd respondent cannot conduct business as the composition contravenes articles 27(8), 175 and 197(1) of the Constitution which provisions require not more than 2/3rd of the member of the county assembly or county executive committee shall be of the same gender a fact admitted by the respondents. The applicant in her further affidavit states that there is no requirement for one to resign as a member of the 2nd respondent before applying for another job, the applicant stated that the issues under paragraphs 17 to 25 of the replying affidavit were being adjudicated in judicial review case No. 1 of 2022 pending before the court and could not be re-litigated in the present matter. On the issue of gratuity the applicant stated that her application for partial gratuity was legally sound. That she never demanded for her full and final terminal benefits as she had not separated from membership of the 2nd respondent. That legislature never intended for a 6 member board to have only one female. That she had challenged the decision to stop her salary and working pursuant to the Ethics and Anti Corruption Commission advice which Applicant stated was unprocedural and illegal in JR case No, 1 of 2022 pending before court.

Response in summary

8. The response was *videre* replying affidavit of Emmanuel Mukhebi Situma dated 9th February 2023 and his supplementary affidavit of 8th march 2023. It is the respondents' case that the claim and the application are knee jerk reaction calculated to frustrate the operations of the County Assembly of Bungoma. That the applicant was first gazetted as a member of the Bungoma County Assembly Service Board in 2013 and having served the first term of 5 years and was gazetted to serve another 5 years(ES-1A). That in the past the board had conducted business of recruitment of deputy clerks and the clerk in absence of the applicant as she was also a candidate and at no time did she challenge the composition of the Board(ES-4 and ES-5). That the applicant was duly nominated on jubilee ticket and gazetted as candidate for Member of Parliament of Webuye West Constituency(ES6a,b and c). That the applicant applied for her gratuity and other dues payable to her at end of term and payment were made(ES-7) That the applicant ought to have resigned on the 8th February 2022 as per the law. That the applicant never tendered resignation from public office and campaigned for seat of Member of Parliament until election day and results announcement (E-8). That it was the Ethics and Anti Corruption Commission which wrote a letter following the foregoing advising stoppage of the applicant's salary pending investigations. That the proposed recruitment was occasioned by the applicant's acts of omissions and commissions. That the clerk is a not a member of the board but secretary. That the applicant still being a member of the board the gender rule is met. That by operation of the law the term of office of member appointed lasts only within the life of a term of the county assembly at end of 5 years and serves upto and until another member is appointed under same procedure. That the claim is meant to prevent another member from being appointed hence prolong the applicant's term.



Determination.

Issues for determination

9. The applicant in their submissions identified the following issues for determination :-
 - a. Whether there is a vacancy in the position held by the applicant as a member of the 2nd respondent as the material time that is open for advertisement
 - b. Whether the 2nd Respondent's composition permit her to conduct any public duties as she is currently composed.
 - c. Whether the Applicant has met the legal threshold to be granted the interlocutory orders.
10. The Respondents in the written submissions identified the following issues for determination in the application:-
 - a. Whether indeed the 2nd respondent herein is irregularly constituted.
 - b. Whether time is nigh for advertisement of the position of member of the 2nd Respondent
 - c. Whether the claimant has satisfied the conditions for the award of the Orders sought.
11. The court having considered the motion and the affidavits by the parties as well as their written submissions is of the considered view the issues for determination in the instant application are as follows:-
 - a. Whether there was a vacancy in the position held by the applicant as a member of the 2nd respondent at the material time that was open for advertisement
 - b. Whether the 2nd respondent herein is irregularly constituted.
 - c. Whether the applicant is entitled to reliefs sought.

Whether there was a vacancy in the position held by the applicant as a member of the 2nd respondent at the material time that was open for advertisement

12. The court notes that the respondents had framed the issue as, 'Whether time is nigh for advertisement of the position of member of the 2nd Respondent'. The advert having already been done (RRN2) and applications time line being 13th February 2023 the issue then was duly framed by the court as per the applicant's. The applicant submits that her position is created under statute Section 12 (3) of the [County Governments Act](#) No. 17 of 2012 to wit:-

'The Board consists of—

- (a) the Speaker of the county assembly, as the chairperson;
- (b) a vice-chairperson elected by the Board from the members appointed under paragraph (c);
- (c) two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and



- (d) one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly”.

13. The Applicant submits that she was appointed and gazetted (RRN1) and remains in office subject to her suspension. That the office advertised has an holder and hence not vacant and relies on the definition of term vacancy in American case of Wallace v Payne 197 Cal. 539 , 241 p, 879 where the word vacancy was stated to mean with relation to an office to be a state of being unoccupied, the term is applied to cases where an office was not filled. The applicant further relied on State ex rel.etc v Maloney , 92 Tenn. 62,72[20S.W. 419] where the court defined the term vacancy to mean:-“There is a vacancy in every instance in which there is an office without an incumbent. Every office without an officer is vacant. Therefore every new office created must of necessity be vacant from time of creation until it is filled by appointment or election.”
14. The Applicant submits that section 12(5)(b) of the County Governments Act provides for vacation of office of membership of the 2nd respondent to wit:-“(b) if the person is an appointed member, on revocation of the person’s appointment by the county assembly; ” and section 12(6) reads:-“ Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly. “That under section 10(3) of the County Assembly Services Act it is the duty of the County Assembly to revoke the applicant’s membership from the 2nd respondent through standing orders. That the respondents have not placed evidence in court to show the 1st respondent’s process of removal of the applicant from office by which a vacancy was created as provided under section 10(3) of the County Assembly Services Act so as to advertise the same vacancy.
15. To buttress her submission on lack of vacancy the applicant relied on the decision in Geoffrey Makana Asanyo v Nakuru Water and Sanitation Company ad 7 others (2014)eKLR where the applicant’s position had been advertised when there was a substantive holder and the court(Byram Ongaya J) held:-

“The 3rd issue for determination is whether there was a vacancy, at all material time, in the position held by the petitioner as director of the 1st respondent and representing the local business community. It is the opinion of the court that a vacancy could occur in an office if the engagement of the holder is terminated; the holder resigns or leaves for any other reason; or a vacancy occurs as provided in the Constitution, legislation or agreement between the parties to the contract of service. First, there is no decision by the relevant organs of the 1st respondent before the court terminating the petitioner’s appointment as a director. The court finds that the advertisement pretended to publish a vacancy in the directorship position held by the petitioner but there was no decision by the general meeting of the 1st respondent to remove the petitioner as director or to declare a vacancy one way or the other. Secondly, it is not said that the petitioner has resigned from the position he holds as director. Thirdly, there is no constitutional, statutory or contractual provision that is said to have attached and thereby rendering the position held by the petitioner as director vacant. Regulation 87(a) and (b) of the 1st respondent’s articles of association as amended at the 1st respondent’s extra-general meeting held on 19.02.2014 is elaborate that the term of directorship shall be three (3) years; and other than directors by reason of other public or state office held, all directors shall retire by rotation at an annual general meeting after serving for a term of 3 years. Accordingly, to answer the 3rd issue for determination whether there was a vacancy, at all material time, in the position held by the petitioner as director of the 1st respondent and representing the local business community, the court returns the finding



that there was no such vacancy at all material time. While making that decision, the court holds that abolition of an office, or re-establishment of an office as was the case in the present case, does not by itself terminate the employment of the holder of the office that is abolished or office that is re-established as the case may be, and if termination is desired, the relevant authority must make the relevant termination decision. It is the opinion of the court that without the relevant termination decision, like in the present case, the holder of the office that is re-established, like the petitioner in the present case, continues in employment.”

16. The Applicant further relied on similar holdings in *Mark Ewesit Ewoi & 4 others v County Government of Turkana & 2 Others* [2018]eKLR and *Duncan Kariuki Gitau & 2 others v Lamu County Public Service Board & Another* [2021]eKLR to extent that it was premature to advertise position held by its incumbent and which was not vacant.

The respondents’ submissions

17. The Respondents submit that the applicant term was deemed to have come to an end when she applied and was paid her gratuity(ES-7 of the replying affidavit) and that the applicant admitted that in paragraph 11 of her further affidavit. To buttress this position the respondents relied on decision of the Court of Appeal in *Bamburi Cement Ltd V William Kilonzi* [2016] eKLR where the court observed:-

‘ Turning to the award of gratuity , the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or upon death of the employee, as a lumpsum amount at the discretion of the employee.’

18. The Respondents submit that the applicant cannot benefit from earning gratuity and at same time continue discharging her function as a board member. That by virtue of receipt of gratuity it was just and expedient for an advertisement to be put up for her replacement on the board even though she remains a board member until a new member is appointed. That this is by dint of section 12(6) of the *County Governments Act* which provides:- ‘Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly.’ That there is a new county assembly in place following the 2022 general elections where the applicant was a also a parliamentary candidate (ES-6 a, b and c). That this was the appropriate time to replace the appointment of the Applicant.

Decision

19. It was not in dispute the claimant/applicant was appointed to office under section 12(3)(d)of the *County Government Act* to wit:- one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.’. The applicant was the one woman appointed under section 12(3)(d)of the *County Government Act* . The applicant was gazetted as a member of the Bungoma County Assembly Service Board on the 13th February 2018. The applicant’s letter of appointment was dated 26th October 2018 and in part states:- ‘This appointment is with effect from the date of taking oath 24th October 2018 until the end of the term when a new member assumes the office in accordance with section 12(6) of the *County Government Act*.’ The said provision reads:-‘Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly.’



20. The Applicant submits that under section 10(3) of the [County Assembly Services Act](#) it is the duty of the County Assembly to revoke the applicant's membership from the 2nd respondent through standing orders. Section 10(3) of the [County Assembly Services Act](#) reads:- '(1) A person who is appointed as a member of the Board under section 12(3) (d) of the [County Governments Act](#) (No. 17 of 2012) may be removed from office on any of the following grounds— (a) violation of the [Constitution](#); (b) inability to discharge duties for any reason; (c) bankruptcy; or (d) if convicted of any offence with a sentence of more than six months imprisonment. (2) Any person may petition the county assembly for the removal of the member of the Board on the grounds specified under subsection (1)(3) The procedure for the removal of a member of the Board under this section shall be as prescribed in the Standing Orders of the county assembly.'
21. The Respondents on other hand states that the applicant is still in office but having applied and been paid her gratuity and a new assembly being in place the process invoked to replace her was as under section 12(3)(d) of the [County Governments Act](#).
22. The court finds that it was not in dispute that the applicant was still in office though she had been stopped from working and that the respondents told the court she was under suspension in Bungoma. JR 1 OF 2023 between the applicant and the respondents and the Ethics and Anti Corruption Commission. The court finds that Section 10(3) of the [County Assembly Services Act](#) is applicable on specific grounds being — '(a) violation of the [Constitution](#); (b) inability to discharge duties for any reason; (c) bankruptcy; or (d) if convicted of any offence with a sentence of more than six months imprisonment.' There was no evidence before the court that these were grounds raised by the respondents for the provision to be invoked. The Court's interpretation of the letter of appointment of the applicant (RRN1) is that termination of the appointment of the applicant was by operation of the law being section 12(6)(d) of the [County Governments Act](#) to wit:- 'Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member's place in the next assembly' and not by the mechanisms envisaged under section 10 of the [County Assemblies Services Act](#). The court finds that there is in place a new assembly in place following the 2022 general elections hence the applicant's position was due for replacement as envisaged under section 12(6)(d) of the [County Governments Act](#) an issue disclosed in her appointment letter. In the circumstances the court finds the authorities cited by the applicant not applicable to her case as her term was to run with the term of the county assembly until replacement under the next assembly. The court noted that under annexure ES-7 the applicant did apply for her gratuity and the reason for exit was indicated as termination and the payment was at 100% and not partial as indicated by the applicant in paragraph 11 of her further affidavit. The court upholds the decision of the Court of Appeal [Bamburi Cement Ltd v William Kilonzi](#) [2016] eKLR where the court observed:- 'Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or upon death of the employee, as a lumpsum amount at the discretion of the employee.' The court applying the said authority finds that the applicant by her application for gratuity signaled her termination of services as a member of the 2nd respondent.
23. The court agrees with Ongaya J in decision cited by the applicant in [Geoffrey Makana Asanyo v Nakuru Water and Sanitation Company ad 7 others](#) (2014) eKLR that:- 'It is the opinion of the court that a vacancy could occur in an office if the engagement of the holder is terminated; the holder resigns or leaves for any other reason; or a vacancy occurs as provided in the [Constitution](#), legislation or agreement between the parties to the contract of service.' (emphasis given) The court applying the said decision holds that based on application for gratuity and having been paid, and by the coming in place a new



assembly following the 2022 general elections, that there is a vacancy by operation of the law in the position held by the applicant to be filled under section 12(6) of the County Governments Act.

Whether the 2nd respondent herein is irregularly constituted.

24. It was the applicant's case that the 2nd respondent is composed of 1 female (the applicant) out of the 5 males, that is a body of 6 persons with only one female in contravention of provisions of Article 27 of the Constitution. That purposive interpretation ensures that there is need to have rights enshrined in the Constitution translated into reality. That to make it worse the only female is on suspension hence the resolutions of the 2nd respondent are null and void. The applicant to buttress her submissions on interpretation of article 27 of the Constitution relied on the advisory opinion of the Supreme Court in Marilyn Muthoni Kamuru & 2 others v Attorney General & another (2016)eKLR to wit: '1. There is no controversy and the parties are in agreement that the Constitution holds dear those who have been historically marginalized; women, youth, persons with disabilities, marginalized communities and other vulnerable persons. Article 27 of the Constitution requires not only equality and freedom from discrimination but affirmative action to remedy these historical wrongs. The State has a duty therefore to ensure full participation of these groups of persons in the affairs of the State. In that regard, the Constitution is replete with provisions that guarantee persons historically disadvantaged are represented in State organs exercising power for and on behalf of the people of Kenya. The Supreme Court in Advisory Opinion No 2 (supra) noted;

The Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution, that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices or gender – indifferent laws, policies and regulations. These sentiments equally reflect the position of persons with disabilities, the youth, minorities and marginalized communities.

22. Broadly speaking this exposition of the law by the Supreme Court sets the scene for determination of the issue in this Petition.

33. There is no doubt that, Article 27(3) provides that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.” In my view, by this provision, the Constitution ensures that men and women are equal and it destroys the traditional patriarchy contour the Kenyan society has for long been constructed upon. In order to ensure men and women participate in the affairs of the development of the Kenyan society, Article 27(6) recognises that there may be need to undertake extra measures. It thus provides:

To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”

Respondents position

25. The respondents submit that the membership of the 2nd respondent under section 12 of the County Governments Act is 5 and not 6 as stated by the applicant. That the clerk of the assembly is a not a member of the board as his roles are stated under section 17 of the County Assemblies Services Act. That by virtue of the applicant's membership the board is properly constituted.



Decision

26. Section 12(3) of the *County Governments Act* provides for the membership of the County Assembly Services Board to consist of— ‘(a) the Speaker of the county assembly, as the chairperson; (b) a vice-chairperson elected by the Board from the members appointed under paragraph (c); (c) two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and (d) one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.’ The court finds that the membership of the County Assembly Services Board under 12(3) of the *County Governments Act* is five and not six as stated by the Applicant.

It was not in dispute that the applicant was still in office though not working pursuant to the advisory of Ethics and Anti Corruption Commission. The court finds that the 2nd respondent is constituted as required under the law. The court further finds that the Supreme Court in its advisory opinion in *Marilyn Muthoni Kamuru & 2 others v Attorney General & another* [2016]eKLR recognized the law to be progressive by stating:- ‘Article 27(6) recognises that there may be need to undertake extra measures. It thus provides:

“To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.” It is obvious extra measures must be put in place especially with regard to elective positions as could be the case of the speaker of the county assembly and even the two members of the county assembly nominated under section 12(3)c of the *Act*. The court nevertheless finds and holds that the 2nd respondent is lawfully constituted with the applicant being female out of the 5 members of the Board.

Whether the applicant is entitled to reliefs sought.

27. The court found that the respondents regularly advertised the position held by the applicant for her replacement under section 12(3)(d) of the *county governments act* to wit:- ‘Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member’s place in the next assembly.’
28. The Applicant submits that she is likely to suffer irreparable damages that cannot be remedied by damages as the appointment is guided by law in respect of which she stands to lose her employment and the subject matter of the case shall be lost. To buttress her submissions the claimant relied on the decision in *Kelvin Kigen Kieti v Kilifi County Public Service Board & another* (2014)eKLR where the court held:- ‘The applicant has contended that his opportunity to serve in the vacancy will be lost for good if the vacancy is not preserved pending the hearing and determination of the suit. In other words, his submission is that once the 2nd respondent is allowed to take over the office, the suit will be rendered nugatory as no amount damages can remedy that lost opportunity. The respondents have however contended that the claimant will suffer no loss because he will still remain employed by the national government which seconded him to the county government.’ The applicant further relied on other decisions on prima facie case, irreparable damages and balance of convenience all seen by the court and taken into consideration.



Respondents case

29. The Respondents submit the claimant has sought for damages for infringement of her rights at Limb f of the prayers. That this means that in fact the claimant can still be compensated by way of damages hence no case of irreparable damages. That there is no prima facie case as the board is legally constituted and further the time was ripe for advertisement of the position of female board member. The respondent cited several authorities in support of the foregoing submissions all taken into consideration by the court.

Decision.

30. The court finds that having held that indeed time was ripe to advertise the position held by the applicant in the board by dint of section 12(3)d) of the County Governments Act following the 2022 general elections and new county assembly being in place, the applicant having applied for and having received gratuity then there was no basis to exercise the court's discretion in favour of the applicant. The court further finds that the applicant in the final prayers seeks damages hence the application does not meet the threshold of irreparable damages. On balance of convenience, the 2nd respondent is prejudiced by absence of the applicant from office due to her own act of participating in the general elections as a candidate which lead to her suspension on advice of Ethics and Anti Corruption Commission and her own application for gratuity on ground of termination.
31. The court without delving into merits of the case, on basis of there being a new assembly the court finds that it would be inconsistent with the intention of parliament under section 12(6) of the County Government Act which reads:- 'Despite subsection (5), when the term of the County Assembly ends, a member of the County Assembly Service Board under subsection (3)(d) shall continue in office until a new member has assumed office in the member's place in the next assembly', to grant the interlocutory orders sought to prevent the process of replacing the applicant as a member appointed under section 12(3) (d) which reads:- 'one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.'

Conclusion

32. The notice of motion dated 31st January, 2023 is held to be without merit and is dismissed.
33. Each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF APRIL 2023 IN OPEN COURT AT BUNGOMA.

JEMIMAH KELL,

JUDGE.

In the presence Of:-

Court Assistant:- Luch Macheso

Applicant :- Absent

Respondents :- Absent

